

TOTAL = 41.5/50  
83%



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3A  
THE INSOLVENCY SYSTEM OF THE UNITED STATES

***This is the summative (formal) assessment for Module 3A of this course and is compulsory for all candidates who selected this module as one of their compulsory modules from Module 3. Please read instruction 6.1 on the next page very carefully.***

***If you selected this module as one of your elective modules, please read instruction 6.2 on the next page very carefully.***

The mark awarded for this assessment will determine your final mark for Module 3A. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. **You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
2. **All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
3. **No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
4. **You must save this document using the following format: [studentID.assessment3A]. An example would be something along the following lines: 202223-336.assessment3A. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "student number" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. **Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 **If you selected Module 3A as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2024. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 6.2 **If you selected Module 3A as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2024 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2024. If you elect to submit by 1 March 2024, you may not**

submit the assessment again by 31 July 2024 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of 9 pages.

**ANSWER ALL THE QUESTIONS**

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Car Corp, incorporated and headquartered in Michigan, owes Parts Inc, incorporated and headquartered in Mexico, USD 10,000 on a past-due invoice for components used to build Car Corp vehicles. May Parts Inc file an involuntary petition to place Car Corp into chapter 11 bankruptcy proceedings?

- (a) Yes, regardless of the circumstances.
- (b) Yes, if Car Corp has fewer than 12 non-contingent, non-insider creditors.**
- (c) Yes, if other creditors owed at least USD 5,775 join in the petition.
- (d) No, because Parts Inc does not know whether Car Corp is insolvent.
- (e) No, because Parts Inc is not a US company.

Commented [FV1]: o, correct answer is C

Question 1.2

Answer this question with reference to the set of facts set out in question 1.1 above: Which of the following is likely to be a party in interest in the bankruptcy of Car Corp?

- (a) A shareholder in Parts Inc, to which Car Corp is indebted.
- (b) A journalist writing about Car Corp's bankruptcy.**
- (c) A shareholder in Investment Corp, Car Corp's parent company.

Commented [FV2]: 1, correct

**(d) A retired employee of Car Corp who receives payments from the company's pension plan.**

(e) A non-profit organization that advocates for companies like Car Corp to be held responsible for climate change

Question 1.3

Which of the following entities does not satisfy the minimum presence requirement to be a debtor under any chapter of the Bankruptcy Code?

(a) A foreign domiciled company that pays a US attorney a retainer.

(b) A company with several US bank accounts, but no physical presence in the United States.

(c) A company with US patents, but no physical presence in the United States.

**(d) Options (a) to (c) above satisfy the minimum requirement for presence in the United States.**

Commented [FV3]: 1, correct

(e) None of the above (options (a) to (d)) satisfy the minimum requirement for presence in the United States.

Question 1.4

Who may serve as a foreign representative to seek recognition of a foreign proceeding under chapter 15?

(a) An officer of the debtor if it is a debtor-in-possession in the foreign proceeding.

(b) The board of directors of the debtor if it is a debtor-in-possession in the foreign proceeding.

(c) An insolvency professional appointed by the court overseeing the foreign proceeding.

(d) An insolvency professional appointed by a creditor where the foreign proceeding is an involuntary receivership.

**(e) All of the above.**

Commented [FV4]: 1, correct

Question 1.5

Which of the following regarding executory contracts is false?

(a) *A court will generally defer to a debtor's business judgment regarding whether to assume or reject an executory contract.*

**(b) Executory contracts are clearly defined by the Bankruptcy Code.**

Commented [FV5]: 1, correct

(c) *In the most common formulation, executory contracts are defined as those where both sides to a contract have material unperformed obligations.*

(d) *Chapter 11 debtors have greater flexibility than chapter 7 debtors on when they may assume, assign or reject an executory contract.*

(e) *Under the hypothetical test, a debtor cannot assume an executory contract if the debtor could not also assign the contract.*

Question 1.6

*Which of the following is not a requirement to confirm a "cramdown" plan?*

(a) *That the plan is fair and equitable to dissenting classes of creditors.*

Commented [FV6]: 1, correct

(b) *Acceptance of the plan by at least one class of impaired, non-insider creditors.*

**(c) Acceptance of the plan by all classes of secured creditors.**

(d) *That the plan does not discriminate unfairly against dissenting classes of creditors.*

(e) *That the dissenting creditors receive no less than they would under a liquidation scenario.*

Question 1.7

*Which of the following statements about "pre-packs" is false?*

**(a) A pre-pack cannot be used if the debtor wishes to reject executory contracts.**

Commented [FV7]: 1, correct

(b) *Creditors must have sufficient information about the debtor and the plan to make an informed voting decision.*

(c) *A pre-pack debtor may spend as little as a single day in bankruptcy.*

(d) *The proposed plan of reorganization is submitted to the bankruptcy court together with the voluntary petition.*

(e) *Creditors' commitment to vote in favor of the plan may be memorialized in a restructuring support agreement.*

Question 1.8

*If a debtor rejects an executory trademark license agreement under which the debtor licenses its trademark to a manufacturer, which of the following is true:*

- (a) The manufacturer has a claim for damages for breach of contract.*
- (b) The manufacturer must immediately stop using the trademark.*
- (c) The manufacturer can continue using the trademark for the remaining period of the license.*
- (d) Both options (a) and (b).*
- (e) Both options (a) and (c).***

Commented [FV8]: 1, correct

Question 1.9

*Which of the following about 363 sales is false?*

- (a) A good faith purchaser at a 363 sale may retain the property notwithstanding a subsequent reversal of court approval for the sale on appeal.*
- (b) The debtor-in-possession must establish that the transaction is in the best interests of the estate as a whole.*
- (c) In chapter 15 proceedings, a foreign court's approval alone suffices for a 363 sale.***
- (d) Debtors must carry out a robust marketing process for the sale.*
- (e) A creditor's lien on assets sold in a 363 sale attaches to the proceeds of the sale.*

Commented [FV9]: 1, correct

Question 1.10

Which of the following regarding substantive consolidation is true?

- (a) It respects the boundaries of corporate separateness.
- (b) If a creditor can show it extended credit on the basis of corporate separateness, it has a valid objection to substantive consolidation.
- (c) It is the treatment of two or more creditors as a single creditor to simplify the claims process.
- (d) Substantive consolidation is commonly used to resolve bankruptcies of corporate groups.
- (e) Authority for substantive consolidation comes from the Bankruptcy Code.

Commented [FV10]: 1, correct

QUESTION 2 (direct questions) [10 marks]

Question 2.1 (1 mark)

What is setoff and why is it not permitted in many circumstances?

Setoff typically involves a situation where a creditor holding a claim against a debtor nets out a claim which the debtor holds against the creditor. It is often not permitted since it can enhance the creditor's position in comparison to other unsecured creditors who are not owed money by the debtor because it reduces the creditor's obligation to the estate by the full amount owed by the debtor rather than the lesser amount which the debtor would pay on the unsecured claim.

Commented [FV11]: 1, correct

Question 2.2 [2 marks]

What is a "priming lien" and what requirements must be met for such a lien to be granted to secure DIP financing?

A "priming lien" is a lien that takes priority over or is equal to a pre-petition lien on estate property, and is granted to secure post-petition financing (if financing cannot be obtained on any other terms).

Commented [FV12]: 1.5. Full credit not given because answer does not mention that priming can only be granted if existing secured lender is adequately protected.

Question 2.3 [2 marks]

What are two potential consequences of a violation of the automatic stay?

First, contempt of court. Second, an act violating the automatic stay is void or voidable.

Commented [FV13]: 2, correct

Question 2.4 [2 marks]

**In voting on a plan of reorganization, which class(es) of creditors are (i) deemed to accept the plan, (ii) deemed to reject the plan and (iii) permitted to vote on the plan? What vote is necessary for a class of creditors to accept a plan?**

*An unimpaired class is deemed to accept the plan whilst a class that receives nothing is deemed to reject the plan. Impaired classes of creditors are permitted to vote on the plan - a given class of creditors will be deemed to accept the plan if a simple majority of the creditors in the class, holding at least two-thirds of the value of claims in the class, vote in favour of, for equity interests, if two-thirds in amount of interests vote in favour.*

Commented [FV14]: 2, correct

Question 2.5 [3 marks]

**Answer the following questions about preferences, actual fraudulent conveyances and constructive fraudulent conveyances:**

- (a) **Which cause of action applies only to transfers made on account of antecedent debt?**
- (b) **Which cause of action requires that the debtor be presumed or proven to have been insolvent at the time of the transfer?**
- (c) **Which cause of action requires that the debtor be proven to have intended to frustrate creditors' recoveries?**

*For (a): a preference claim.*

Commented [FV15]: 3, correct

*For (b): a preference claim.*

*For (c): an actual fraudulent conveyance.*

**QUESTION 3** (essay-type questions) [15 marks in total]

Commented [la16]: 13.5/15 marks

Question 3.1 [3 marks]

Commented [la17]: 2.5/3 marks

**Describe the circumstances in which a bankruptcy court may enter a final order consistent with the US Constitution, who reviews appeals from bankruptcy court orders and how orders that are not constitutionally final are reviewed.**

*A bankruptcy court may enter a final order consistent with the US Constitution in the following ways: (a) issuing a final order in respect of a core proceeding over which they lack authority by issuing a report and recommendation for review by the district court; or (b) issuing final orders with the consent of parties.*

Commented [la18]: The bankruptcy court can enter a final order on a core proceeding that is exclusive to the Bankruptcy Code, such as a challenge to a petition.

Commented [la19]: This is how a non-final order is reviewed.

Commented [la20]: Correct, 1/2 mark



For the most part, appeals from bankruptcy court orders are heard by the **district court** for the district in which they sit. However, there are certain circuits where bankruptcy appeals are heard by a **Bankruptcy Appellate Panel**, convened from the judges of the bankruptcy courts within the circuit. Nevertheless, in those circuits, a party has the option to request that the appeal be heard by the district court instead.

Commented [la21]: Correct, 1/2 mark

Commented [la22]: Correct, 1/2 mark

From the district court or BAP, there is a further appeal of right to the circuit court of appeals.

Orders that are not constitutionally final will face a *de novo* review on appeal in respect of all findings of fact and conclusions of law to which a party has objected.

Commented [la23]: Correct, 1 mark

Question 3.2 [3 marks]

Commented [la24]: 2/3

What provisions of the Bankruptcy Code may not be invoked by a foreign representative in a chapter 15 proceeding? What are two ways that the foreign representative can obtain equivalent relief?

Chapter 15 does not grant foreign representatives the right to use the **avoidance powers** provided by the Bankruptcy Code.

Commented [la25]: Correct, 1 mark

The first way a foreign representative can obtain equivalent relief is where a **plenary proceeding** such as that under chapter 7 or 11 was initiated by a debtor or its creditors prior to the foreign representative's involvement. The second way is where the foreign representative may choose to initiate a plenary proceeding under the Bankruptcy Code following recognition of the foreign proceeding under chapter 15.

Commented [la26]: Correct, 1 mark. Alternatively, the foreign representative can pursue equivalent claims under applicable US or foreign law.

Question 3.3 [4 marks]

Commented [la27]: 4/4

What rules should one review when preparing a filing for a bankruptcy court?

The **Federal Rules of Bankruptcy Procedure**, the **Federal Rules of Civil Procedure**, **local rules of procedure for the specific bankruptcy court**, and the **personal practices of the individual judge(s)**.

Commented [la28]: Correct, 1 mark

Commented [la29]: Correct, 1 mark

Commented [la30]: Correct, 1 mark

Commented [la31]: Correct, 1 mark

Question 3.4 [5 marks]

Commented [la32]: 5/5 marks

What fiduciary duties do directors of Delaware corporations owe and to whom are the duties owed in the ordinary course of business? To whom are duties owed when the corporation is potentially or actually insolvent?

Directors of Delaware corporations owe a fiduciary duty of **loyalty** to the corporation's best interest and a duty of **care** in educated decision-making. They owe these duties to the **corporation and its shareholders** in the ordinary course of business, and **even when the corporation is potentially or actually insolvent**.

Commented [la33]: Correct, 1 mark

Commented [la34]: Correct, 1 mark

Commented [la35]: Correct, 1 mark

Commented [la36]: Correct, 1 mark

Commented [la37]: Correct, 1 mark

**QUESTION 4** (fact-based application-type question) [15 marks in total]

Commented [la38]: 9.5/15 marks

**Question 4.1** [5 marks]

Commented [la39]: 1.5/5

*iWork Ltd leases office space from office building owners and sublets the space to small businesses. Due to the increases in the numbers of businesses operating remotely, iWork Ltd has suffered a decline in revenues. As a result, it has failed to pay rent on some of its office space leases. What protections does the Bankruptcy Code provide to lessors of office space to iWork Ltd?*

*Either the trustee (in a Chapter 7 case) or the debtor-in-possession (in a chapter 11 case) will be required to make a decision on whether to reject, assume, or assign the contract. Where the contract is rejected, the debtor will be deemed to have breached the contract before the petition date, giving the lessor an unsecured pre-petition claim in damages. Where the contract is assumed, iWork must cure defaults and give the lessor sufficient assurances of its future performance. Where the contract is assumed and assigned, iWork's rights under the contract will be transferred to a third party, which must give the lessor adequate assurances of future performance.*

Commented [la40]: Correct, 1/2 mark, there is a 120 day deadline which can be extended up to 90 days for cause, but no longer without landlord consent.

Commented [la41]: Correct, 1 mark. Also, post-petition rent is due as an administrative priority and if a debtor assumes and then rejects a lease, it must pay 2 years' rent as an administrative expense.

**Question 4.2** [5 marks]

Commented [la42]: 4/5

*Skin Luxe is incorporated and has a principal place of business in France where it develops and manufactures high end skincare products. Skin Luxe sells its skin care products through its own boutiques in many international cities, including Paris, Las Vegas, London and Hong Kong. Skin Luxe's English law-governed bonds are due to mature in one year, but it is unable to repay or refinance them. Skin Luxe is considering using an English scheme of arrangement to restructure the bonds.*

*Discuss whether the English scheme of arrangement could be granted recognition under US chapter 15 as a foreign main or foreign non-main proceeding.*

*The requirements of recognition under chapter 15 are as follows - the foreign representative must establish that a foreign court or administrative proceeding with respect to the debtor is pending and that the foreign representative is empowered to act by the proceeding. That would be satisfied in the present case, as the scheme is a collective judicial or administrative proceeding in a foreign country under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation. The public policy exception is unlikely to apply given its narrowness.*

*The proceeding is likely to be recognised as a foreign non-main proceeding, given that Skin Luxe's centre of main interests appears to be France. Skin Luxe is likely to be found to have an establishment in England, given that it sells its skin care products through its own boutiques in London - this satisfies the definition of an*

Commented [la43]: Correct, 1 mark

Commented [la44]: Correct, 1 mark, also France is presumed to be the COMI based on its incorporation there

Commented [la45]: Correct, 1 mark

*"establishment" as a place where the debtor carried out non-transitory economic activity.*

Commented [la46]: Correct, 1 mark

Question 4.3 [5 marks]

Commented [la47]: 4/5

*Speculation Inc is engaged in day-trading stocks from leased office space with two employees. It funds its trading through a margin loan from its broker, where the shares it purchases are held as collateral. For a while, Speculation Inc was very successful in trading, and the US Department of Justice (DOJ) has announced an investigation into whether its success was due to illegally trading on insider information. More recently, Speculation Inc has had serious trading losses, causing its broker to declare a default on the margin loan. It also has fallen behind on its rent, and has been sued in civil suit by a former employee alleging she was fired due to gender bias.*

*What would be the effect of a chapter 11 petition being filed by Speculation Inc on each of (i) the DOJ investigation, (ii) margin loan default; (iii) the delinquent lease and (iv) the employment discrimination lawsuit?*

*A worldwide automatic stay comes into effect immediately on the filing of a chapter 11 petition being filed. In relation to the DOJ investigation, there is a statutory exception to the stay in respect of regulatory investigations (11 USC, s 362(b)) such that the stay would not apply to the DOJ investigation. In relation to the margin loan default, the stay would apply to any act to obtain the shares held as collateral, and would also apply to prohibit the broker from commencing an action in respect of the margin loan (which is a pre-petition claim). In relation to the delinquent lease, the stay would apply to any attempt to collect on pre-petition claims (eg, to claim the rental monies). In relation to the employment discrimination lawsuit, the stay is operative as it applies to any litigation on pre-petition claims.*

Commented [la48]: Correct, 1 mark

Commented [la49]: Correct, 1 mark

Commented [la50]: Incorrect, the margin loan is a securities contract that is exempt from the automatic stay, so the broker can sell the shares despite the bankruptcy filing.

Commented [la51]: Correct, 1 mark, including an action for eviction.

Commented [la52]: Correct, 1 mark

\* End of Assessment \*